No. 84-1414

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FREDRIC HABERMAN, *et. al.*,

Petitioners,

—V.—

CHEMICAL BANK and WASHINGTON PUBLIC POWER SUPPLY SYSTEM, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF WASHINGTON

NINE RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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April 11, 1985

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QUESTION PRESENTED

Were six bondholders' due process rights implicated when the Washington Supreme Court denied their motion to file a complaint in intervention during the final stages of the appeal of a declaratory judgment action in which their interests had been fully represented by the bond fund trustee, their designated representative?

PARTIES TO THE PROCEEDING

The Petition for Certiorari sets forth the parties to this proceeding. This Brief in Opposition to the Petition for Certiorari is submitted by nine utilities that are respondents herein and were respondents below. The "Nine Respondents" are as follows:

Big Bend Electric Cooperative, Inc., Washington;
Lincoln Electric Cooperative, Inc., Washington;
City of Milton-Freewater, Oregon;
Missoula Electric Cooperative, Inc., Montana;
Ravalli County Electric Cooperative, Inc., Montana;
Salmon River Electric Cooperative, Inc., Idaho;
Tanner Electric Cooperative, Washington;
Vera Irrigation District No. 15, Washington; and
Vigilante Electric Cooperative, Inc., Montana.

The Petition for Certiorari incorrectly identifies two of the Nine Respondents. Vera Irrigation District No. 15 is incorrectly identified as Vera Irrigation District No. 10, and Ravalli County Electric Cooperative, Inc. is incorrectly identified as 'Pavelli' County Electric Cooperative, Inc.

None of the Nine Respondents has any subsidiaries or other affiliates. The Nine Respondents are unaware of any affiliates or subsidiaries of other respondents.

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STATEMENT OF THE CASE

Petitioners (also called the "Haberman petitioners") are six purchasers of revenue bonds issued by the Washington Public Power Supply System (the "Supply System") to finance the construction of Nuclear Projects 4 and 5 (also called the "Projects"). Following the termination of the Projects in January 1982, Chemical Bank, the bond fund trustee for holders of Project 4 and 5 bonds, including the Haberman petitioners, sought a judgment declaring that the utilities participating in the Projects were obligated under the Participants' Agreement to make payments to the Supply System sufficient to pay principal and interest on the bonds. After the Washington Supreme Court determined on interlocutory review that certain cities and public utility districts lacked authority to enter the Participants' Agreement, *Chemical Bank v. Washington Public Power Supply System,* 99 Wash. 2d 772, 666 P.2d 329 (1983) (*"Chemical Bank I"*), the trial court entered a final judgment declaring that the Agreement was invalid and unenforceable. The trial court also ruled that payment obligations could not otherwise be imposed upon participants on the basis of legal and equitable theories related to contract.

The appeal of the trial court's judgment was heard by the Washington Supreme Court in March of 1984. On November 6, 1984, the court issued its opinion affirming that judgment. *Chemical Bank v. Washington Public Power Supply System,* 102 Wash. 2d 874, 691 P.2d 524 (1984) (*"Chemical Bank II"*) (Appendix A to Petition for Certiorari). Chemical Bank and the Supply System have filed a Petition for a Writ of Certiorari seeking review of that decision. *Chemical Bank v. Public Utility District No. 1 of Benton County,* No. 84-1258 (petition for cert. filed Feb. 4, 1985) (hereinafter the "Chemical Bank Petition for Certiorari").

Two months before oral argument of the appeal before the Washington Supreme Court, the Haberman petitioners requested permission from the supreme court to file a complaint in intervention. After hearing oral argument by the petitioners' counsel, the Washington court denied their request as untimely in its *Chemical Bank II* opinion.

Because Chemical Bank and the Supply System have sought a Writ of Certiorari, the Haberman petitioners filed this Petition for Certiorari challenging the Washington Supreme Court's denial of their motion to intervene. The Haberman petitioners apparently request that their petition be considered only if the Chemical Bank Petition for Certiorari is granted. Petition for Certiorari at 5-6.

The history of the Chemical Bank litigation underlying this petition for certiorari is more fully set forth in the Nine Respondents' brief opposing the Chemical Bank Petition for Certiorari. The Nine Respondents incorporate that brief in opposition to the Haberman Petition for Certiorari. Several additional facts should be considered in connection with this petition for certiorari.

First, the complaint in intervention that the Haberman petitioners proposed to the Washington Supreme Court presented an array of additional factual allegations and added new claims and new defendants. Specifically, it added a claim based upon state securities laws against the original defendants. It also asserted various tort and securities claims against the engineering firms responsible for the construction of the Projects, the bond counsel who gave legal opinions in connection with the issuance of bonds, and the Supply System's financial consultants. Thus, the Haberman motion for intervention was not limited to the declaratory judgment action on appeal before the Washington Supreme Court. Instead, it sought to expand the scope of the original proceeding into a damage action based on new claims against the original defendants and other parties involved in constructing and financing the Projects.

Second, the Haberman petitioners have been vigorously pursuing all of their claims in separate litigation before the Washington courts. On May 7, 1984, the petitioners filed a complaint identical to their proposed complaint in intervention in superior court in Seattle, Washington. *Haberman v. Washington Public Power Supply System*, No. 84-2-06452-8 (Super. Ct. King County filed May 7, 1984) (the "Haberman action"). That complaint has since been amended several times to include new factual allegations and new defendants. Groups of large institutional bondholders have also joined the Haberman action. The

Haberman petitioners are currently amending their complaint to allege a claim under § 12(2) of the Securities Act of 1933. In short, every claim that the petitioners sought to assert by intervening in the Chemical Bank litigation is now being pursued in the Haberman action. Through that action, the Haberman petitioners have seized their opportunity for a full and fair hearing of their claims.

REASONS FOR DENYING THE WRIT

1. *The Petition for Certiorari Does Not Raise a Constitutional Question.*

The Haberman Petition for Certiorari raises no constitutional question. The essence of the petition is that the Washington Supreme Court's denial of the Haberman intervention motion was contrary to Washington law. Petition for Certiorari at 19. Even if that were true, this Court does not sit to correct a state court's errors in deciding state law. *Ex parte Converse*, 137 U.S. 624, 631 (1891). A due process question does not arise when a state's highest court allegedly makes an error in ruling on state law. *Gryger v. Burke*, 334 U.S. 728, 731 (1948). In this case, the Washington court neither committed an error nor denied the petitioners any right of due process by deciding that their last-minute motion to intervene was not timely.

The procedural rules of the Washington courts have always provided that any motion to intervene must be made in a timely fashion:

> Upon *timely application* anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Wash. Civ. R. 24(a) (emphasis added). In this case the Washington court simply held that the timely application requirement imposed by the procedural rules governing the conduct of

all civil cases applies in a declaratory judgment action.[1] *Chemical Bank II*, 102 Wash. 2d at 887-88, 691 P.2d at 532-33 (Appendix to Petition for Certiorari at 28a-29a). The Washington Supreme Court's decision did not change any existing procedural rule.[2]

Nor has the denial of the motion to intervene deprived the Haberman petitioners of any due process right. The Due Process Clause of the fourteenth amendment affords litigants an opportunity for a hearing appropriate to the nature of the case. *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). By denying the motion to intervene, the Washington Supreme Court did not deprive the Haberman petitioners of the opportunity to be heard on any of their claims. Indeed, before the court issued its decision, the petitioners filed their complaint in King County Superior Court. That action has been pending for almost a year and the petitioners continue to add new factual allegations and new legal claims.

The Washington court's decision raises no constitutional question under *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). There, the Alabama Supreme Court ruled in a novel and strained interpretation of its existing case law that the plaintiffs had chosen the wrong procedural avenue to seek review of a civil contempt judgment. The Alabama Supreme Court's procedural decision, if allowed to stand, would have

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1. Petitioners imply that they could not have intervened in a timely fashion because the trial court had enjoined the bondholders from declaring a default on the bonds pending entry of a final judgment. Petition for Certiorari at 21-22. That order did not prevent the Haberman petitioners from intervening in a declaratory judgment action to determine the enforceability of the Participants' Agreement between the Supply System and the participants. It provides no excuse for their failure to do so at a reasonable stage in the Chemical Bank litigation.

2. The petitioners argue that the Washington Supreme Court was required to allow intervention by its previous holding in *Williams v. Poulsbo Rural Telephone Association*, 87 Wash. 2d 636, 555 P.2d 1173 (1976). In that case, the court characterized the declaratory judgment statute as jurisdictional and held that the failure of the beneficiary of a trust to join all beneficiaries in a declaratory action against the trustee was a jurisdictional defect. Timely intervention was not at issue in *Poulsbo*, and the case therefore did not create any exception to the timeliness requirement of Wash. Civ. R. 24(a) for declaratory judgment actions. Moreover, in *Poulsbo* the court was required to apply "the general rule that all beneficiaries must be joined in an action by a beneficiary against a trustee." 87 Wash. 2d at 648, 555 P.2d at 1180. That rule does not reach this case, where the trustee is suing third parties on behalf of the beneficiaries.

foreclosed any scrutiny of the important constitutional rights impinged by the contempt judgment. Here, however, the Washington Supreme Court's denial of the motion to intervene at the final appellate phase of the bond fund trustee's declaratory judgment action simply redirected the Haberman action to a more appropriate forum. Because no opportunity for a hearing was denied by the decision, no due process question arises.

The Haberman petitioners attempt to gerrymander the denial of their motion to intervene into a constitutional question by asserting error in the Washington court's holding that the bondholders were adequately represented in the Chemical Bank litigation by the bond fund trustee. However, both this Court's decisions and Washington law establish that Chemical Bank could legally represent the interests of the bondholders in the Chemical Bank litigation. *See, e.g., Kersh Lake Drainage District v. Johnson*, 309 U.S. 485, 491 (1940); *Richter v. Jerome*, 123 U.S. 233, 248 (1887); *State ex rel. Cannery Workers & Farm Laborers Union v. Superior Court*, 30 Wash. 2d 697, 193 P.2d 362 (1948); *Fahrenwald v. Spokane Savings Bank*, 179 Wash. 61, 35 P.2d 1117 (1934).[3]

The petitioners also attempt to conjure up a due process question by raising irrelevant objections to the adequacy of Chemical Bank's representation of the bondholders. For example, petitioners now assert that Chemical Bank could not have adequately represented the bondholders in the Chemical Bank litigation because (1) it lacked standing to assert securities claims on behalf of the bondholders, (2) it did not sue certain other parties for damages, and (3) it could not represent former bondholders who had sold their bonds. This argument is specious. The petitioners' objections have no bearing on Chemical Bank's ability to represent bondholders in a declaratory action related to the obligations imposed by the Participants' Agreement.

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3. Moreover, Chemical Bank was designated as the bondholders' representative to bring suit on their behalf to enforce or protect their rights and to determine the participants' obligations under the Participants' Agreement. *Chemical Bank II*, 102 Wash. 2d at 888-89 n.5, 691 P.2d at 533 n.5 (Appendix to Petition for Certiorari at 31a-33a n.5); Supply System Bond Resolution No. 890, § 11.4 at 89. No violation of due process occurs when a state court rules that the petitioners' designated representative may legally represent them in a declaratory judgment action.

Finally, the Haberman petitioners charge that Chemical Bank's representation of the bondholders is marred by a conflict of interest. Petition for Certiorari at 25. They assert that Chemical Bank represents the Supply System in supervising disposition of the assets of the Projects. In fact, no conflict of interest exists. Chemical Bank, as the bond fund trustee, does not represent the Supply System in assuming control over the Projects' assets—it represents only the bondholders in liquidating the assets for their benefit.

2. *The Due Process Arguments Raised By the Petitioners Are Not Adequately Presented to the Court By This Case.*

The due process arguments that the Haberman petitioners have advanced are not adequately presented by this petition. In denying intervention, the Washington Supreme Court did not deprive the petitioners of the opportunity for a hearing; it merely prevented the petitioners from disrupting complex litigation by adding new factual allegations, claims, and parties during the final appellate stage. All of the Haberman petitioners' claims are now pending before a Washington court.

Until the Washington courts have considered and decided petitioners' claims, including the effect of the *Chemical Bank II* judgment on those claims, petitioners' constitutional objections based on due process are premature. Petitioners' reliance on factual assertions undeveloped in this record make their constitutional arguments even more speculative. The Haberman petitioners have the opportunity to develop their factual allegations in the action now pending in the Washington superior court. However, until those facts are determined and the state law issues are decided, petitioners have neither a basis nor an adequate record upon which to present a constitutional question.

CONCLUSION

The Haberman petitioners seek to create a constitutional question from the Washington Supreme Court's denial of their last-minute motion to intervene. The Washington court's decision did not change a procedural rule and did not deny the petitioners of the opportunity to present their claims. Indeed, they are pursuing those claims in the Washington courts.

This Petition for Certiorari requests the Court to speculate about factual issues and legal claims without a record adequate for constitutional review. Until the petitioners' arguments are adequately before the Court, it should not review a state court's procedural decision—the denial of an untimely intervention motion—that presents no constitutional question.

For these reasons, the Nine Respondents respectfully request that the Haberman Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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